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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 2003

No. _____

"In re
REGGIE D. HUFF AND LISA G. HUFF

Petitioners"

v.

SUSAN P. GRABER, RONALD M. GOULD
AND REGGERO J. ALDISERT,
Circuit Court Judges for the 9th Circuit

Respondents

THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, an Oregon corp.; JDH SERVICES INC., an Oregon corp.; JOHN D. HALLSWORTH, JR.;ROBERT K. JACKSON; LUANN JACKSON; RODERICK A. BOUTIN,

Co- Respondents

APPENDIX

PETITION FOR WRIT OF MANDAMUS AGAINST 9th CIRCUIT PANEL

(Oral Arguments Requested)
(Expedited Procedure Requested)

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IN THE
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APPENDIX

PETITION FOR WRIT OF MANDAMUS
AGAINST 9th CIRCUIT PANEL

(Oral Arguments Requested)
(Expedited Procedure Requested)

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TABLE OF CONTENTS

OPINION – Judge King, September 6, 2001 3

OPINION – Judge King, January 3, 2002 20

Plaintiffs' Motion for Reconsideration/Amend Judgment 29

Appellants' Opening Brief – Front page only 40

Letter of Reassignment to Oral Argument Panel 42

Letter of Thanks and Acknowledgement of Oral Arguments 43

Schedule for September 11 & 12, 2003 Oral Arguments 44

ORDER of Submission Without Oral Argument 45

ORDER Denying Motion for Reconsideration of Order for Case Submission Without Oral Arguments 46

MEMORANDUM – 9th Circuit Panel – Affirming 47

PETITION: Investigate Discrimination & Suspension Pending Disposition & For Rehearing – En Banc Requested 51

AFFIDAVIT in Support of Petition 68

ORDER to File Petition 70

ORDER Denying Petition 71

AMENDED MEMORANDUM – 9th Circuit – Affirming 73

ORDER Denying Appellants' Motion to Recall Mandate, to Clarify Amended Memorandum, to Reconsider Order to Reconsider Recusal of Panel, to Return Court Fee 78

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC; an Oregon Corp.; REGGIE D. HUFF and LISA A. HUFF,

Plaintiffs,

v.

THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, INC., an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK A. BOUTIN,

Defendants.

Civil No. 01-447 KI

OPINION

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DISTRICT OF OREGON
PORTLAND, OREGON
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KING, Judge:

Plaintiffs Reggie and Lisa Huff [1] allege that defendants engaged in various schemes to steal the Huffs' business, plaintiff Acro-Tech, Inc., away from them. Previously before the court were: (1) defendants Hallsworth and JDH Services, Inc.'s motion to dismiss or to stay or to enlarge time (326) and; (2) defendants

Robert and Luann Jackson[2], the Robert K. Jackson Family Trust ("Jackson Trust") and LB Land, Inc.'s motion to dismiss or to stay or to enlarge time (#24) . After oral argument, I agreed to defer ruling on these motions because of several procedural difficulties with removal and remand of a related case and to allow defendants to move against the merits of the complaint. Currently before the court are: (1) defendant Boutin's motion to dismiss (#46); defendants Hallsworth and JDH Services, Inc.'s motions to dismiss (#48); defendants Robert Jackson, Luann Jackson, The Robert K. Jackson Family Trust and LB Land, Inc.'s motion to dismiss (#50); and plaintiff's motion to strike (#54).

ALLEGED FACTS

Plaintiffs Reggie and Lisa Huff are the founders and majority shareholders of plaintiff Acro-Tech, Inc. Huff patented four inventions related to internal combustion engine performance and environmental compatibility. He assigned some of the patents to Acro-Tech. Plaintiffs allege that defendants, actin through an enterprise, tried to acquire Acro-Tech through unlawful means and for no compensation in order to gain control of its patents. Defendants' methods included: (1) ruses to gain access to Acro-Tech's confidential business information; (2) threatening Acro-Tech directors to resign and give up their shares in the corporation; (3) forcing Acro-Tech to defend frivolous lawsuits concerning its leased office space; and (4) threatening litigation if plaintiffs did not trade stock as defendants wished.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." Gilligan v. Jamco Development Corp., 108 F.3d 246, 248 (9th Cir. 1997). Normally, the review is limited to the complaint,

[1] I will refer to Reggie Huff as "Huff" and his wife as "Lisa Huff."
[2] I will refer to Robert Jackson as "Jackson" and his wife as "Luann Jackson."

and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Id.

A court may deny leave to amend when any proposed amendment would be futile. Reddy v. Litton Industries, Inc., 912 F.2d 291, 296 (9th Cir. 1990), cert. denied, 502 U.S.C. § 1962 prohibits the following:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and is or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962.

Plaintiffs allege claims under each section of the statute against various defendants.

A. Section 1962(c) (Claim One)

A violation under § 1962(c) requires proof of: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Howard v. America Online, Inc., 208 F.3d 741, 746 (9th Cir.), cert. denied, 531 U.S. 828 (2000).

1. Enterprise

Defendants contend that plaintiffs do not adequately allege a separate enterprise and do not allege how the enterprise engaged in interstate commerce.

An enterprise under RICO includes groups with a formal legal structure and groups whose members merely associate in fact. Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir.), amended on other grounds, 234 F.3d 428 (9th Cir. 2000), cert. denied, 121 S. Ct. 843 (2001). A group cannot be an enterprise, however, unless it exists independently from the racketeering activity in which it engages. It must have some sort of structure for making decisions and mechanisms for controlling and directing the affairs of the group on an on-going basis rather than an ad hoc basis. A conspiracy is not a RICO enterprise. Id.

Plaintiffs allege [3] the following facts concerning the structure of the enterprise. The enterprise is an association in fact comprised of Jackson, Jackson Trust, Hallsworth, LB Land, and JDH Services. It is operated, managed and/or controlled by all of them. Defendant corporations, LB Land and JDH Services, adopted or approved the

[3] First Amended Complaint at 13 ¶ C; AT 14 ¶ G; AT 16 ¶¶ 52-54; AT 20 ¶ 74, 77.

unlawful activities of Jackson and Hallsworth. The Jackson Trust is an alter ego of Jackson created to protect assets of Jackson and to provide tax benefits. Boutin, as attorney for Jackson and Hallsworth, filed a mandamus action against Acro-Tech concerning shareholder access to corporate records. Boutin filed the action as part of an effort to direct and control the enterprise and its efforts to acquire control over Acro-Tech. Boutin's actions in representing defendants were a significant managerial act of control over the enterprise.

Plaintiffs also allege under the RICO conspiracy claim that Boutin used his legal skills to direct and control the efforts of the enterprise to acquire control over Acro-Tech and to evade a judgment entered in an FED action between the parties. He also directed and managed the affairs of the enterprise in its appearance before the courts and aided and abetted Jackson, Luann Jackson, LB Land, and Hallsworth in their efforts to remove Hall from control of Acro-Tech.

Plaintiffs contend that the inclusion of two corporations in the enterprise satisfies the requirement that the enterprise is an entity separate and apart from the pattern of racketeering activity I which it engages, relying on Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996). Chang held that the involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. The court went on to find that although the corporation was named as a member of the enterprise, the complaint did not allege how the corporation was related to or participated in the alleged enterprise. Consequently the court held that the complaint did not properly allege an enterprise. Id. At 1300-01.

Plaintiffs allege that Acro-Tech employed JDH Services to perform accounting services, giving JDH Services access to Acro-Tech's confidential business and financial information. LB Land was the landowner for the premises Acro-Tech leased, allowing LB Land to use the lease as a basis for FED litigation. This is adequate to meet the test under Chang for a separate entity.

Plaintiffs, however, do not sufficiently allege the structure of the enterprise or its mechanisms for directing its affairs. It is not alleged whether decisions are consensual, with all members having an equal say, or whether there is a hierarchy within the enterprise. Plaintiffs allege that Boutin, who is not an alleged member of the enterprise, controls its affairs. I conclude that the enterprise is not adequately pleaded.

2. Predicate Acts

Plaintiffs allege predicate acts of mail fraud, wire fraud, extortion, Travel Act violations, and Interstate Transportation of Fraudulently obtained Money violations. Defendants contend that the facts alleged do not constitute violations of these criminal statutes.

Predicate acts must be conduct which is indictable. Howard v. America Online, Inc., 208 F.3d 741, 748 (9th Cir.), cert. denied, 531 U.S. 828 (2000); § 1961(1).

i. Mail and Wire Fraud

RICO actions alleging the predicate act of fraud must plead with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme. Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 405 (9th Cir. 1991) (mail fraud), cert. denied, 502 U.S. 1094 (1992). The complaint must allege what is false about a representation and why it is false. In re Glenfed Inc. Securities Litigation, 42 F.3d 1541 (9th Cir. 1994) (Rule 9(b) requirement applied to federal securities claims).

To allege a violation of the mail fraud statute, 18 U.S.C. § 1341, a plaintiff must show: (1) defendants formed a scheme or artifice to defraud; (2) defendants used the United States mail or caused a use of the mail in furtherance of the scheme, and (3) defendants did so with the specific intent to deceive or defraud. Rothman v. Vedder Park Management, 912 F.2d, 315, 316 (9th Cir. 1990).

The crime of wire fraud under 18 U.S.C. § 1343 has the same elements but substitutes used of the wires for use of the mail. United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001).

After reviewing the first amended complaint, all of the allegations plaintiffs consider to be predicate acts of wire and mail fraud lack specificity as required under the case law. For example, in ¶ 38(j) and (k), plaintiffs allege:

> By falsely communicating by wire and mail to Plaintiff Reggie Huff that John Hallsworth would review the company's books and papers and thereby inducing plaintiffs to trust and rely upon these representations to authorize Hallsworth to access the confidential books and records of Acro-Tech.
>
> By executing fraudulent documents which were used and communicated through the U.S. mails in order to further the scheme to defraud Plaintiffs of their property interest in Acro-Tech.

This fails to allege the times, the roles of each defendant, what is false about the representation that Hallsworth would review the corporate books, which documents were fraudulent, and why they were fraudulent.

ii. Extortion

The statute states:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined……

Extortion is defined as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(a), (b)(2).

Plaintiffs allege that in January 1997, Jackson demanded that the Huffs surrender all but 3% of their Acro-Tech stock at less

than market value or face a ruinous class action lawsuit which the Huffs and the corporation could not afford to defend. In April 1997, Jackson, Luann Jackson, and John Hallsworth demanded that plaintiffs purchase these defendants' stock at an inflated price or risk legal action. Jackson and Hallsworth threatened the Huffs with economic damage from the sue of confidential business information gained by Hallsworth while working as an accountant for Acro-Tech. I consider these sufficient allegations for three predicate acts of extortion.

Plaintiffs also allege that Jackson threatened to destroy the value of Huff's patents. This does not adequately plead extortion because it does not allege the wrongful way in which the value of the patents would be destroyed. One way to destroy the value of a patent, by inventing something better, is not wrongful.

Defendants allegedly used their status as shareholders to threaten Acro-Tech board members that their personal assets were at risk from shareholder litigation. Although the substance of the extortion is adequately pled, I doubt that all seven defendants were involved. I will not consider this as a predicate act until plaintiffs specify which defendants engaged in the conduct.

On numerous occasions, Jackson and Hallsworth allegedly attempted to coerce plaintiffs into signing a promissory note on behalf of Acro-Tech to pay for the repurchase of shares from Jackson Trust, with the note secured by all assets of Acro-Tech, including its patents. I will not consider this a predicate act until plaintiffs specify the coercion and approximate time frame. The coercion details are necessary to determine if there was extortion and the time frames are necessary when analyzing below if a pattern exists.

Plaintiffs also allege that Jackson and Hallsworth demanded in March 1997 that Reggie Huff meet with them and a board member. There is nothing wrongful about this conduct as alleged.

Jackson and Hallsworth allegedly made extortionate demands for improvements to the property leased to plaintiffs which plaintiffs did not owe under the terms of the lease. Plaintiffs

must give specifics of what demands were made and why they were wrongful under the terms of the lease.

iii. Travel Act

Among other things, the Travel Act prohibits use of the mails or any facility of interstate commerce, including the telephone system, with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of certain unlawful activity, namely extortion as alleged by plaintiffs. 18 U.S.C. § 1952(a)(3). None of the predicate acts of extortion which are sufficiently alleged, as explained above, allege that the mail or facilities of interstate commerce were involved. Thus, there are no predicate acts of violation of the Travel Act under the current allegations.

iv. Transportation of Stolen Money

The violation of the act prohibiting the transportation of stolen goods or money, as alleged by plaintiffs, states that whoever transports, transmits, or transfers in interstate commerce $5,000 or more of money, known to be stolen or taken by fraud, violates the statute. 18 U.S.C. § 2314. Plaintiffs allege that money in excess of $5,000 obtained from a fraudulently obtained lease between Acro-Tech and LB Land was deposited in various banking institutions knowing that the money was obtained by fraud. Acro-Tech allegedly entered into a three-year lease with LB Land in reliance on representations from Jackson. No specifics are alleged on how the lease was fraudulently obtained. This predicate act is not sufficiently alleged.

3. Pattern

Defendants contend that plaintiffs do not adequately allege a pattern of racketeering activity because the actions do not give rise to the required continuity.

A pattern is at least two acts of racketeering activity within ten years of each other. Howard v. America Online, Inc., 208 F.3d 741, 746 (9th Cir.), cert. denied, 531 U.S. 828 (2000); 18 U.S.C. § 1961(5). Although two acts are necessary, they are not sufficient to

find a violation. A pattern requires a showing of a relationship between the predicates and of the threat of continuing activity. Id. at 746.

"Related conduct embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. at 749 (quoting H.J., Inc. v. northwestern Bell Telephone Co., 492 U.S. 229, 240, 109 S. Ct. 2893 (1989)) (internal quotation marks omitted). Having the same participants, by itself, is insufficient to establish relatedness. Id.

The continuity requirement requires a plaintiff to prove either "a series of related predicates extending over a substantial period of time [, i.e., closed-ended continuity], or "past conduct that by its nature projects into the future with a threat of repetition [i.e., open-ended continuity]" Id. at 750 (internal citations omitted). Predicate acts extending over a few months are not sufficiently continuous to meet the requirement for close-ended continuity. Id. Open-ended continuity is shown by predicate acts that specifically threaten repetition or become a "regular way of doing business." Id.

Based on the analysis above, plaintiffs currently allege three predicate acts of extortion: (1) in January 1997, Jackson demanded that the Huffs surrender all but 3% of their stock at less than market value; (2) in April 1997, Jackson, Luann Jackson, and John Hallsworth demanded that plaintiffs purchase these defendants' stock at an inflated price; and (3) Jackson and Hallsworth threatened the Huffs with economic damage from the use of confidential business information gained by Hallsworth.

Plaintiffs generally allege that defendants are trying to acquire Acro-Tech for no compensation to gain control of its patents. The second predicate act, a demand to repurchase defendants' stock, is opposed to that purpose.

I am unable to say that the three predicates show open-ended continuity because the current situation of stock ownership and the value of the patents, such as when they expire, is not alleged. Thus, I have no way to determine if a scheme to gain

control of the patents would likely continue into the future. I cannot say that the three predicates show close-ended continuity because the two which are tied to dates took place only three months apart. Consequently, plaintiffs have failed to allege a pattern of racketeering activity.

In summary, the alleged violation of RICO § 1962f© is dismissed for failure to adequately plead an enterprise and a pattern of racketeering activity.

B. Section 1962(a) and (b) (Claim Two)

The second claim alleges violations of sections (a) and (b) of RICO:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchase, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962.

Defendants first contend that the arguments above also apply to this claim. This is not true concerning whether an enterprise is sufficiently alleged.

> The "enterprise" referred to in subsections (a) and (b) is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity....
>
> By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of the activity.

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259, 114 S. Ct. 798 (1994). Plaintiffs are correct that the enterprise referred to in this claim is Acro-Tech itself.

The § 1962(a) and (b) claim fails because plaintiffs have not adequately alleged a pattern of racketeering activity. Moreover, none of the three remaining predicate acts allegedly resulted in control of Acro-Tech. Plaintiffs do not allege that they capitulated in any of the extortion. This is fatal to the § 1962(b) part of claim two. The § 1962(a) part of claim two also suffers from lack of any income being derived from the remaining predicate acts. The only income to defendants alleged by plaintiffs would be the rent, but none of the predicate acts predicate acts concerning the rent were adequately pleaded. Claim Two is dismissed..

B. Section 1962(d) (Claim Three)

Defendants note that this conspiracy claim must fail because the substantive RICO claims are not adequately pleaded. Boutin also contends that plaintiffs do not adequately allege an argument.

"To establish a violation of section 1962(d) [conspiracy], Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." A § 1962(d)

conspiracy claim cannot survive if the substantive claim does not state an action upon which relief could ever be granted. Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir.), cert. denied, 531 U.S. 828 (2000).

Because the substantive RICO violations are being dismissed, the conspiracy claim must also be dismissed.

II. Oregon RICO

Oregon RICO, ORS 166.715-166.735, is modeled after the federal statute. Federal cases interpreting the federal statute are persuasive in interpreting the intent of the Oregon legislature. State v. Blossom, 88 Or. App. 75, 78-79, 744 P.2d 281 (1987), rev. denied, 305 Or. 22 (1988).

In claim 4, plaintiffs allege a violation of ORS 166.720(3), which parallels § 1961(c). Consequently, Claim 4 is dismissed for insufficiently alleging an enterprise.

In Claim 5, plaintiffs allege a violation of ORS 166.720(2), which parallels § 1962(b). Claim 5 is dismissed for insufficiently alleging a pattern of racketeering activity.

Plaintiffs allege in Claim 6 a violation of ORS 166.720(4), which parallels § 1961(d), a RICO conspiracy. Claim 6 is dismissed for lack of a properly pleaded substantive Oregon RICO claim.

III. State Common Law Claims

A. Abuse of Process

An abuse of process is the "perversion of legal procedure to accomplish an ulterior purpose when the procedure is commenced improper form and with probable cause." Kelly v. McBarron, 258 Or. 149, 154, 482 P.2d 187 (1971). The elements of abuse of process are: (1) an ulterior purpose; (2) a willful act in the use of process not proper in the regular conduct of the proceeding; (3) injuries beyond those which are a common burden on parties to litigation; and (4) an actual arrest or a seizure of property. Larsen v. Credit Bureau, 279 Or. 405, 408, 568 P.2d 657 (1977); Clausen v. Carstens, 83 Or. App. 112, 118, 730 P.2d 604

(1986) (imposition of a receiver on spouse's business during a dissolution proceeding which caused immediate interference with the business and its income and credit is a special injury); Reynolds v. Given, 72 Or. App. 248, 256, 695 P.2d 946 (1985) (counterclaim in a replevin action for plaintiff to receive property awarded to defendant by probate court; plaintiff never had the property so it was not seized from her).

Plaintiffs allege that the two FED actions and the mandamus proceeding for access to corporate records were brought to divert their resources into the defense of litigation claims, furthering defendants' goal of taking control of Acro-Tech. No arrest or seizure of property is pleaded. Plaintiffs distinguish Reynolds because it is also an action for replevin of property. Clausen was not, however. Its underlying case was a bitter dissolution proceeding in which the spouse's business was "seized" by the receiver. Moreover, the court reaffirmed this element in Lee v. Mitchel, 152 Or. App. 159, 179, 953 P.2d 414 (1998). Plaintiffs also do not plead any injuries beyond having to defend the actions. In Clausen, the business collapsed. Finally, plaintiffs allege no willful act improper in the normal course of the proceedings.

The abuse of process claim is dismissed.

B. Interference with Business Relations

Defendants contend that plaintiffs do not allege interference with existing contracts or other business relations Acro-Tech had with other parties. Defendants also contend that the allegations that defendants were trying to take over the business does not state a claim for this tort.

The elements of the torts of intentional interference with economic relations are: (1) the existence of a professional or business relationship; (2) intentional interference with the relationship; (3) by a third party, (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. McGanty v. Staudenraus, 321 Or. 532, 535, 901 P.2d 841 (1995).

The only allegations I see that relate to any type of a relationship with a third party are those concerning some of defendants coercing two board members to resign. There are no allegations that these are economic relationships or of the damages caused by the resignations. This claim is dismissed.

C. Breach of Contract

Plaintiffs allege that the Jacksons, Jackson Trust, and LB Land breached the lease dated March 19, 1996, by interfering with plaintiffs' right to the quiet and peaceful enjoyment of the leased premises, by filing wrongful FED actions, and by seeking to impose repair costs incident to a potential termination of the lease which are unauthorized by the lease agreement.

Defendants contend that plaintiffs failed to allege interference with plaintiffs' use or occupation of the premises, as opposed to annoyance caused by defendants' actions, do not allege that the lease prohibits filing FED actions, and are talking about prospective conduct only concerning the repair costs, which is not a current breach of the lease.

Defendants' arguments are well taken. Plaintiffs acknowledge that they failed to allege that they were eventually forced from the premises. I also note that a contract can only be breached by a party to the contract. Likewise, damages for breach of contract are only suffered by a party to the contract or a third party beneficiary. Paragraph 15 alleges that Acro-Tech leased the premises from LB Land. Typically, these two parties are the only ones involved in a breach of the lease.

The breach of contract claim is dismissed.

IV. Leave to Replead

Defendants ask that the action be dismissed with prejudice because of the numerous previous cases between the parties. Although that is true, I intend to ignore the past history unless an event is relevant to a claim before me or a court ruling has preclusive effect. Neither of these affect whether repleading will be futile. Consequently, I will give plaintiffs a chance to replead the complaint to correct the problems discussed above.

I make a few other requests of plaintiffs. With this many parties in a case, it is hard to track which claims are alleged by and against which parties. I ask that plaintiffs keep their use of the generic terms "plaintiffs" and "defendants" to instances in which they apply to all plaintiffs or all defendants. Otherwise, list out the proper parties taking part in the conduct being alleged. In particular, in the title for each claim, list the defendants who are allegedly liable for the claim. Also remember that longer is not necessarily better. The first amended complaint contains a lot of redundant information, making it difficult to find the allegations which support a claim. For example, ¶¶ 15, 17, 19 could have been combined into one much shorter paragraph while conveying the same information. Paragraphs 36, 38(d), and 38(f) appear to be talking about the same conduct. Paragraphs 20 and 21 are not relevant to any of the claims. The complaint should be streamlined before the additional required details are added.

CONCLUSION

Plaintiff's motion to strike (#54) is granted. The analysis is based on the allegations in the complaint.

Defendant Boutin's motion to dismiss (#46), defendants Hallsworth and JDH Services, Inc.'s motions to dismiss (#48), and defendants Robert Jackson, Luann Jackson, The Robert K. Jackson Family Trust and LB Land, Inc.'s motion to dismiss (#50) are granted. Plaintiffs may file a second amended complaint within 20 days of the date of this opinion. Discovery will remain stayed until the court rules on any motions to dismiss the second amended complaint, or until defendants' time to respond to the second amended complaint passes, whichever is later.

Defendants Hallsworth and JDH Services, Inc.'s motion to dismiss or to stay or to enlarge time (#26) and defendants Robert and Luann Jackson, The Robert K. Jackson Family Trust ("Jackson Trust") and LB Land, Inc.'s motion to dismiss or to stay or to enlarge time (#24) are denied as moot.

Dated this 6th day of September, 2001.

GARR M. KING
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC; an Oregon Corp.; REGGIE D. HUFF and LISA A. HUFF,

Plaintiffs,

v.

THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, INC., an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK A. BOUTIN,

Defendants.

Civil No. 01-447 KI

OPINION

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PORTLAND, OREGON
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KING, Judge:

Plaintiffs Reggie and Lisa Huff allege that defendants engaged in various schemes to steal the Huff's business, plaintiff Acro-Tech, Inc., away from them. On September 6, 2001, I granted all defendants' motions to dismiss the first amended complaint but gave plaintiffs leave to file a second amended complaint. Defendants moved against the second amended

complaint (corrected) ("Complaint")[1]. Before the court are defendants Hallsworth and JDH Services, Inc.'s motion to dismiss (72), defendants Robert Jackson, Luann Jackson, The Robert K. Jackson Family Trust and LB Land, Inc.'s motion to dismiss all RICO claims with prejudice and decline supplemental jurisdiction on the remaining state common law claims.

[1] Plaintiffs discovered some small errors in the Second Amended Complaint and filed a corrected version. I will refer to the corrected version as the "Complaint."

OVERVIEW OF ALLEGED FACTS

Plaintiffs Reggie and Lisa Huff are the founders and majority shareholders of plaintiff Acro-Tech, Inc. Huff patented four inventions related to internal combustion engine performance and environmental compatibility. He assigned some of the patents to Acro-Tech. Plaintiffs allege that defendants, acting through an enterprise, tried to acquire Acro-Tech through unlawful means and for no compensation in order to gain control of its patents. Defendants' methods included three schemes: (1) attempt to acquire Acro-Tech and gain control of the patents; (2) use of positions as shareholders to demand that Acro-Tech buy them out at an inflated price or risk legal action; and (3) force Acro-Tech to defend frivolous lawsuits concerning its leased office space.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." Gilligan v. Jamco Development Corp., 108 F.3d 246, 248 (9th Cir. 1997). Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Id. The court, however, may consider whether conclusory allegations follow from the description of facts alleged. Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

A court may deny leave to amend when any proposed amendment would be futile. Reddy v. Litton Industries, Inc., 912 F.2d 291, 296 (9th Cir. 1990), cert. denied, 502 U.S. 921 (1991).

DISCUSSION

I. Preliminary Matters

Before the court are motions to dismiss for failure to state a claim. Accordingly, the analysis will be based on the allegations as they stand in the current Complaint. Therefore, I deny plaintiffs' motion for Rule 56(f) discovery because I am not going to engage in any fact finding, as they contend. I also will not consider the additional evidence contained in the Declaration of Reggie Huff.

II. RICO

A. Section 1962 (Claim One)

The Racketeer Influence and Corrupt Organizations Act ("RICO") prohibits the following:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

A violation under § 1962(c) requires proof of: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Howard v. America Online, Inc., 208 F.3d 741, 746 (9th Cir.), , 208 F.3d 741, 746 (9th Cir.), cert. denied, 531 U.S. 828 (2000).

Defendants contend that plaintiffs do not adequately allege a separate enterprise.

An enterprise under RICO includes groups with a formal legal structure and groups whose members merely associate in fact. Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1083 (9th Cir.), amended on other grounds, 234 F.3d 428 (9th Cir. 2000),

cert. denied, 121 S. Ct. 843 (2001). A group cannot be an enterprise, however, unless it exists independently from the racketeering activity in which it engages. It must have some sort of structure for making decisions and mechanisms for controlling and directing the affairs of the group on an on-going basis rather than an ad hoc basis. A conspiracy is not a RICO enterprise. Id.

Plaintiffs allege the following facts concerning the structure of the enterprise. The enterprise is an association in fact comprised of Jackson, Jackson Trust, Hallsworth, LB Land, and JDH Services. Jackson, Luann Jackson, and Hallsworth controlled the enterprise through their positions as officers and directors of the corporations which are members of the enterprise. Decisions were collectively made by Jackson and Hallsworth and each worked in cooperation with the other as indicated by the exchange of stock between them and the sharing of confidential information learned by Hallsworth from his work as an accountant for Acro-Tech. Boutin controlled the enterprise as counsel of record in various court proceedings and as trustee on deeds of trust.

Plaintiffs do not sufficiently allege the structure of the enterprise or its mechanism for directing its affairs. The conclusory allegation, made on information and belief, that Jackson and Hallsworth collectively make decisions is based on the separate conduct each was engaged in, the allegation that the two men owned JDH Services together, and the transfer of stock between them. The allegations of misconduct vary greatly, allegedly ranging from extortion of board members to groundless FED actions to complaints filed with government agencies regulating securities. Considering this, the allegations are insufficient to plead control of the enterprise on an on-going rather than an ad hoc basis. Moreover, plaintiffs allege that Boutin, who is not an alleged member of the enterprise, controls its affairs. That would be a most unusual management structure. There is also no allegation that the enterprise utilized a structure separate and apart from the predicate acts to distribute the proceeds of the transactions. See Chang v. Chen, 80 F.3d 1293, 1300 (9th Cir. 1996).

Plaintiffs contend that the inclusion of two corporations in the enterprise satisfies the requirement that the enterprise is an

entity separate and apart from the pattern of racketeering activity in which it engages, relying on Chang. Chang held that the involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. The court went on to find that although the corporation was named as a member of the enterprise, the complaint did not allege how the corporation was related to or participated in the alleged enterprise. Consequently, the court held that the complaint did not properly allege an enterprise. Id. at 1300-01.

I previously stated that the employment of JDH Services to perform accounting services, thus giving JDH Services access to Acro-Tech's confidential business and financial information, and LB Land's use of the lease as a basis for FED litigation was adequate to meet the test under Chang for a separate entity. On further reflection, I have changed my mind.

In Planned Parenthood v. American Coalition of Life Activists, 945 F. Supp. 1355 (D. Or. 1996), reh'g en banc granted, 268 F.3d 908 (9th Cir. 2001), the court held that the American Coalition of Life Activists ("ACLA"), a national organization, was the RICO enterprise. The other defendants and enterprise members were also members of ACLA, including a separate organization, Advocates for Life Ministries. The court dismissed the single defendant who did not belong to the ACLA. Thus, the organizational structure of the ACLA was one and the same as the organizational structure of the enterprise. Id. at 1384-85.

Likewise, in Webster v. Omnitrition International, Inc., 79 F.3d 776 (9th Cir.), cert. denied, 519 U.S. 96 (1996), the corporation which was allegedly running a pyramid sales scheme was found to be the RICO enterprise. Id. at 876-87. The other members of the enterprise were officers and other principals of the corporation, and its outside counsel.

Finally, in Simon v. Value Behavior health, Inc., 208 F.3d 1073 (9th Cir.), amended on other grounds, 234 F.3d 428 (9th Cir. 2000), cert. denied, 121 S. Ct. 843 (2001), the court held that plaintiff alleged that defendants collaborated to defraud health plan beneficiaries but did not adequately allege a RICO enterprise. The

numerous defendants, primarily insurance companies and their agents, insurance industry trade groups, employee benefit plans, employers, and governmental entities, included many corporations.

Based on a study of the facts in these cases, I conclude that plaintiffs have not adequately alleged how an enterprise consisting of two corporations, a trust, and two men who allegedly control the three entities, are structured and operate as an enterprise as opposed to an ad hoc conspiracy. Accordingly, the § 1962(c) RICO claim (claim one) is dismissed.

B. Section 1962(b) (Claim Two)

The second claim alleges violations of section (b) of RICO:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b).

Defendants contend that plaintiffs fail to allege a pattern of racketeering activity and fail to allege that anything was acquired through the use of illegal activities.

Plaintiffs allege that some of the defendants attempted to gain control of Acro-Tech through the nonmonetary means of pressuring board members to resign and filing complaints with state agencies regulating securities. "Control" under § 1962(b) does not require formal control such as holding a majority of stock or being named as an officer or director. Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990). The control required, however, is obtaining a financial interest in the enterprise. See National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994) (victim enterprise must be an entity that was acquired).

The only financial interest or control of Acro-Tech alleged by plaintiffs is that on July 16, 1996, Jackson Trust purchased $50,000 of Acro-Tech stock which was later transferred among various defendants. There is no allegation that this stock was

obtained through racketeering activity. It appears to be a legitimate purchase which was allegedly later used as leverage by defendants. That allegation, however, does not state a claim under § 1962(b). Compare Gagan v. American Cablevision, Inc., 77 F.3d 951, 961 (7th Cir. 1996) (evidence of defendants acquiring interests in limited partnerships with stolen funds and funds converted from the limited partners themselves supports a § 1962(b) claim) with Discon, Inc. v. Nynex Corp., 93 F.3d 1055, 1062 (2nd Cir. 1996) (control of victim enterprise legally acquired during a divestiture fails to state a claim under § 1962(b)), cert. denied, 522 U.S. 908 (1997).

Consequently, plaintiffs' second claim under § 1962(b) is dismissed.

C. Section 1962(d) (Claim Three)

"To establish a violation of section 1962(d) [conspiracy], Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." A § 1962(d) conspiracy claim cannot survive if the substantive claim does not state an action upon which relief could ever be granted. Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir.), cert. denied, 531 U.S. 828 (2000).

Because the substantive RICO violations are being dismissed, the conspiracy claim must also be dismissed.

III. Oregon RICO

Oregon RICO, ORS 166.715-166.735, is modeled after the federal statute. Federal cases interpreting the federal statute are persuasive in interpreting the intent of the Oregon legislature. State v. Blossom, 88 Or. App. 75, 78-79, 744 P.2d 281 (1987), rev. denied, 305 Or. 22 (1988).

In Claim Four, plaintiffs allege a violation of ORS 166.720(3), which parallels § 1962(c). Consequently, Claim Four is dismissed for insufficiently alleging an enterprise.

In Claim Five, plaintiffs allege a violation of ORS 166.720(2), which parallels § 1962(b). Claim Five is dismissed for

insufficiently alleging an interest acquired by racketeering activities.

Plaintiffs allege in Claim Six a violation of ORS 166.720(4), which parallels § 1962(d), a RICO conspiracy. Claim Six is dismissed for lack of a properly pleaded substantive Oregon RICO claim.

IV. Type of Dismissal for RICO Claims

Although the Complaint is entitled the Second Amended Complaint (Corrected), it is the fourth complaint plaintiffs filed in this action. I wrote a lengthy opinion dismissing the First Amended Complaint which explained in detail the deficiencies in the allegations and gave plaintiffs permission to replead. Consequently, all RICO and Oregon RICO claims dismissed in the Second Amended Complaint (Corrected) are dismissed with prejudice.

IV. State Common Law Claims

Plaintiffs' remaining claims, for abuse of process, intentional interference with business and economic relations, and breach of contract, all arise under Oregon common law. All federal claims have been dismissed and there is no diversity jurisdiction. I decline to exercise supplemental jurisdiction over the three state law claims and dismiss them without prejudice. 28 U.S.C. § 1367(c)(3).

CONCLUSION

Defendant Hallsworth and JDH Services, Inc.'s motions to dismiss (#72), defendants Robert Jackson, Luann Jackson, The Robert K. Jackson Family Trust and LB Land, Inc.'s motion to dismiss (#74), and defendant Boutin's motion to dismiss (#76) are granted in part. The action is dismissed.

DATED this 2 day of January 2002.

GARR M. KING
United States District Court Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ACRO-TECH, INC; an Oregon Corp., REGGIE D. HUFF; and LISA G. HUFF, Plaintiffs, vs. THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, INC., an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, Jr.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK A. BOUTIN	CASE No. CV'01-447 KI PLAINTIFFS' MOTION FOR RECONSIDERATION/ AMEND JUDGMENT Non-Discovery Motion Oral Argument Requested

Plaintiffs, by and through their undersigned counsel, [1] respectfully move this Court to reconsider and reverse its Opinion and Judgment of **January 2, 2002** dismissing with prejudice the federal RICO claims and the State ORICO claims in the Second Amended Complaint, and declining jurisdiction over the state claims. [2] For the following reasons, Plaintiffs contend that the Court's application of the RICO substantive law requirements at the pleading stage was in error, and further that the Court erred in

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[1] At present undersigned counsel are counsel of record for 1) Acro-Tech Inc.; 2) Lisa Huff; and 3) Reggie Huff. Mr. Reggie Huff, as an individual, has informed his attorneys that he is asserting his right to represent himself and has directed his counsel to cease representing him as his personal attorney on this case. However, LR 83.11, (D. Or.) states that counsel may withdraw only "with leave of court" and following the filing of a motion to withdraw. There is some conflict between the client's direction to his attorneys, which would leave the client in a **pro se** status, and the Court's rules on the method and timing for withdrawal. Therefore, this Motion for Reconsideration is filed on behalf of Reggie Huff only pending the Court's approval nunc pro tunc and issuance of an Order once a motion to withdraw as attorney for Reggie Huff is filed by counsel.

[2] The Judgment was entered upon a Rule 12(b)(6) Motion to Dismiss. Plaintiffs respectfully suggest that the use of the term "Judgment" for entry of an Order of Dismissal may be inappropriate. Judgments are normally listed in Rules 55-57 dealing with an Order which has the effect of awarding some king of affirmative relief upon a specific claim to the moving party. A Rule 12(b)(6) Motion seeks no such relief. However, an Order of dismissal of the Complaint has the effect of a "Judgment" for purposed of the right to appeal. See FRCivP Rule 54(a).

Given the Court's entry of a "Judgment", Rule 59(d) and (e) appear *appropo* the filing of a motion for reconsideration. This Motion for Reconsideration or Amendment of Judgment is styled to conform with that Rule even though there has been no trial or award of relief upon a claim.

not allowing the Plaintiffs the opportunity to file a Third Amended Complaint to satisfy the changed interpretation of RICO's "Enterprise" requirements as set forth in the Court's opinion. Plaintiffs submit that by reversing its earlier opinion on the meaning of Chang v Chen, 80 F. 3d 1293 (9th Cir., 1996) , 80 F. 3d 1293 (9th Cir., 1996) **after** the Second Amended Complaint had been filed, the Court should allow the Plaintiffs to file a revised Complaint in conformity with the Court's new explanation of RICO. See Rule 15(a), F.R. Civ. Proc.

1. The § 1962(c) RICO claim, 18 U.S.C. § 1962(c) was dismissed upon the Court's conclusion that the Second Amended Complaint (hereinafter deemed simply "the Complaint") failed to adequately allege the existence of an Enterprise independent of the racketeering activity in which it engages, i.e. with a "structure for making decisions and mechanisms for controlling and directing the affairs of the group on an ongoing basis rather than an ad hoc basis." Opinion, page 4. In so ruling the Court did not decide that any other grounds for dismissal of the various RICO claims as raised by Defendants existed. Accordingly, Plaintiffs assume that the other bases for dismissal asserted by the Defendants was/were denied. Plaintiffs urge this Court to reconsider its decision on the Enterprise element and reverse its Judgment of dismissal of this claim..
2. The Court also has dismissed the Complaint with prejudice without leave to file an Amended Complaint to conform to the Court's **new opinion** on the pleading requirements imposed by RICO. In so doing, the Court **reversed** its own earlier opinion [which had dismissed the First Amended complaint for lack of a pattern] which found there was an Enterprise based on Chang v Chen, 80 F. 3d 1293 (9th Cir., 1996). That earlier opinion imposed guidelines for the drafting of the Second Amended Complaint. Se Opinion page 5: "I have changed my mind." This mid-trial modification in how the court is applying RICO results in extreme prejudice to the Plaintiffs as they are now punished with a dismissal with prejudice for not conforming to a Judicial opinion that did not exist and could not be anticipated during the drafting of the Second Amended Complaint. Not only has the

court tightened the standards for pleading under Rule 8, but it has imposed new pleading requirements not found in RICO and which are inconsistent with the RICO statue itself. See Infra. Now not only must a structure within the meaning of Chang be alleged, but the Plaintiff must also be able to divine and plead the internal structure of the Enterprise that is seeking to take over its business and is engaging in racketeering activities that are known only by the impact they have on the victim-Plaintiffs.

The use of new pleading rules and the revision to this Court's own explication of Chang v Chen warrant that Plaintiffs be permitted to file another Amended Complaint. Otherwise the Plaintiffs are punished for the Court's own actions which benefit only Defendants without the participation of Plaintiffs in the litigation/motions process. Rule 15 commands that leave to amend be granted liberally. That standard includes the opportunity to insert in the Complaint those facts which comport with the Court's current declaration of the law.

3. DISMISSAL OF THE § 1962(c) CLAIM WAS IN ERROR. The Court's view of the necessary elements of an Enterprise which must be alleged (not proven) at the pleading stage is erroneous. See Opinion at pp. 5-7. The Court has incorrectly grafted an economic analysis onto the RICO statute contrary to several explicit opinions from the Supreme Court rejecting such any revisionist interpretation of the plain language of the RICO statute.

   a. The Court requires that the Complaint allege how the "proceeds of the transactions" were distributed and relate that to the structure of the Enterprise. This is a new requirement for a RICO complaint. The Supreme Court has focused on the decision making process with regard to the commission of the predicate acts, not to the later-in-time distribution of "proceeds", whatever that term may mean. A RICO violation foes not require proof of any "proceeds" or any other economic benefit to the defendants. RICO has always been understood, by Congress, the Supreme Court, and other federal courts as punishing those who would use racketeering activities to exert control over other persons or organizations

such that interstate commerce is affected. See, e.g. See U.S. v Santoni, 585 F.2d 667, at 673 (4th Cir., 1978), cert. den. 440 U.S. 910 (Extortion conviction based on loss of the property right "to make a business decision free form outside pressure wrongfully imposed...Extortion ... does not require a direct benefit to the extortionist, the gravamen of the offense is loss to the victim; and such loss includes intangible as well as tangible property" (citations omitted); Reeves v Ernst & Young, 507 U.S. 170 (1993); Nat'l Org. for Women v Scheifler, 510 U.S. 249 (1994).

b. In NOW v Scheidler the Supreme Court specifically held that RICO does not require an economic motive. Hence there can be no requirement that a Complaint address how proceeds are distributed since there need be no proceeds at all. Id at 258-261. "Predicate acts may not benefit the protesters [defendants] financially but may drain money from the economy by harming businesses....". As the Supreme Court noted, the language of subsection (b) does not mandate that the Enterprise be a "profit-seeking" entity. Nothing further is required for a Subsection (c) Enterprise. In that situation the Enterprise is engaging in unlawful activities directed at other, yet "it need not have ... an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity". Id at 259.

c. The Court has erred in interpreting the definition of Enterprise under Chang v Chen as requiring that the members of the Association-in Fact Enterprise also be participants, employees, or owners of the corporation that is used to give structure to the Enterprise within the meaning of Chang v Chen. See Opinion, page 6. The Court erred in dictating that in an association in fact Enterprise, 18 U.S.C. § 196 (4) requires that a corporation be synonymous, if not identical, with the Enterprise. See Opinion, page 6. Again the court's application of Chang v Chen is used to re-write the RICO statue itself and impose requirements and restrictions not found within the statute itself. This the Court cannot do. See Sedima v Imrex, 473 U.S. 479 (1985); U.S. v Turkette, 452 U.S. 579, 581

(1981); H.J. Inc. v Northwestern Bell Tel., 492 U.S. 229, 248 (1989). An Enterprise includes any entity capable of making a decision. It may consist solely of a corporation or it may consist of a corporation acting together with other individuals associated in fact even though the group itself is "not a legal entity". See 18 U.S.C. § 1961(4). The that the group need not be a legal entity is contrary to this Court's Opinion holding that individuals and separate corporations that make up the Enterprise must be bound together in some form of singular "legal entity". The Court's interpretation of Planned Parenthood v American Coalition of Life Activists, 945 F. Supp. 1355 (D. Or., 1966) reh. En banc granted, 268 F.3d 908 (9th Cir., 2001); Webster v Omnitrition Int'l. Inc., 79 F.3d 776 (9th Cir.,) cert. den. 519 U.S. 96 (1996); and Simon v Value Behavioral health, Inc., 208 F.3d 1073 (9th Cir.), amended on other grounds 234 F.3d 428 (9th Cir., 2000), cert. den, -U.S.-, 121 S.Ct. 843 (2001) rewrites the statutory definition of an Enterprise and directly limits the statute to prosecution of only intra-corporate conspiracies as association in fact enterprises.

d. The Court's requirement that a Complaint alleging an association in fact enterprise, which includes a corporation must also describe how operational decisions are made within the Enterprise, is incorrect and puts the trial cart before the discovery horse. Rule 8 does not require that this kind of proof be elaborated within the Complaint itself. Rule 56 is the proper procedural vehicle for claiming that the facts do not indicate a structured decision making process as opposed to an ad hoc conspiracy. Rule 56 authorizes a Court to make a factual determination of whether and how the Enterprise operates. This new requirement for RICO pleading incorporates the issue of control required in order to make an individual liable **as a participant** for the predicate acts committed by and through the Enterprise, See Reeves v Ernst & Young, 507 U.S. 170 (1993), into the basic definition of the Enterprise for pleading purposes. 18 U.S.C. § 1961(4) does not contain in its definition any limitation on Enterprise to those groups of

individuals associated in fact which have any one form of structure and/or operation.

e. The Complaint adequately alleges how the Enterprise operates. It alleges that Jackson and Hallsworth are partners in JDH Services, and as partners each controlled that corporation. It alleges that Jackson owns and controls both JDH Services and LB Land, Inc. and also The Jackson Family Trust. It alleges that Defendant Boutin directed and controlled the Enterprise in his efforts to gain control over the patents on behalf of the Enterprise and that he also served as Trustee on various Deeds of Trust executed by the Jackson Family Trust. The Trust was also the corporate vehicle used to purchase shares of stock in Acro-Tech which shares were later exchanged between the Trust and Hallsworth, who was also Jackson's partner in JDH Services. Unless someone was taking notes, there is nothing more that can be alleged in the Complaint in advance of discovery on the decision-making process. There is no factual basis upon which this Court can rely to conclude that decisions were not made collectively by Defendants Jackson, Hallsworth, and Boutin.

f. The Court erred in characterizing the Enterprise as simply an "ad hoc conspiracy". See Opinion, page 6. The Court did not grant the Defendants' Rule 12(b)(6) motion to dismiss on the basis that no pattern was adequately alleged. The allegation of a pattern is inconsistent with the finding of an "ad hoc conspiracy". "Ad hoc" and "Pattern" are mutually exclusive terms. Once the pattern is shown, the Plaintiff is entitled to prove either a substantive violation under §§ 1962(b) or (c) or a conspiracy under § 1062(d). Proof of a conspiracy does not negate the existence of an Enterprise. See Salinas v U.S., 522 U.S. 52 at 65 (1997) [§1962(c) violations are often conducted by more than one person thus making it "difficult to determine just where the enterprise ends and the conspiracy begins..."] The Court's opinion has erred in using the existence of a conspiracy to deny the existence of an Enterprise.

4. THE DISMISSAL OF THE §1962(B) CLAIM WAS IN ERROR. The Court again demands factual proof in the

Complaint of damages suffered by Acro-Tech and has imposed the duty to plead the obtaining of a financial interest in the Enterprise in a §1962(b) Claim. This is contrary to the Supreme Court's clear ruling in NOW v Scheidler, 510 U.S. 259 (1994) that no economic motive need be alleged. Acquisition of a financial interest is but one means of acquiring control. In NOW v Scheidler the defendant protesters were not trying to obtain any financial interest in the targeted corporation. Rather they were trying to prevent it from operating. The Supreme Court upheld the use of RICO to fight this type of enterprise activity under 18 U.S.C. §1962(c). The Court's citation to NOW v Scheidler, 510 U.S. at 259 is a misreading of the decision. The Supreme Court only held that under a §1962(a) or (b) claim the Enterprise is the entity that is being acquired through illegal activity. The preceding portion of that sentence stated that "...(b) does not mandate that the enterprise be a 'profit-seeking" entity". For a §1962(c) violation the Enterprise is not required to have any "economic motive for engaging in economic activity". Id at 259.

a. The Complaint alleges the acquisition of control over Acro-Tech through a pattern of racketeering, i.e. extortion and mail fraud. "Control" as a noun is defined by Black's Law Dictionary as: "The ability to exercise a directing or restraining influence over something". The allegations in the Complaint meet that definition under the §1962(b) claim.

b. Defendants Jackson and Hallsworth and the Jackson Family Trust acquired a financial interest in Acro-Tech which they then used to acquire control through acts of racketeering.

c. The Defendants acquired their stock ownership, or financial interest in Acro-Tech, through acts of racketeering, to wit: Mail and Wire Fraud as is alleged in the Complaint. The lease of office space LB Land is alleged to have been induced by acts of mail and wire fraud. The rent money and the value of improvements to the leased space was then used by the Defendants to purchase stock in Acro-Tech. The Court's opinion disregards the continuing line between the initial predicate acts and the use of the proceeds from the

racketeering to acquire a stock-ownership interest in Acro-Tech as the victim Enterprise under §1962(b).

5. THE COURT ERRED IN DISMISSING THE CONSPIRACY CLAIM, §1962(d). For the reasons stated in Salinas v. U.S., 522 U.S. 52, 63-66 (1997) and the RICO statue itself, the Court erred in concluding that the conspiracy claim cannot exist independent of the substantive RICO claims under §1962(b) and (c),

   a. To sustain a §1962(b) or (c) claim, two or more overt (predicate) acts must be proven to establish the pattern of racketeering. The RICO conspiracy claim does not require proof of any overt predicate act by a co-conspirator. At most, some act must be proven as part of the damages or standing aspect of the claim which limits recovery to those persons injured "by reason of" a §1962 violation. See 18 USC §1964(c). The Court's Opinion indicates that a pattern of racketeering was shown by the Complaint. In Salinas the Court ruled that under §1962(d) "there is no requirement of some overt act or specific act... the RICO conspiracy provision is, then, even more comprehensive that the general conspiracy offense in §371." id at 63, "The RICO conspiracy statue §1962(d), broadened conspiracy coverage by omitting the requirement of an over act...." Id at 64. Based on this the Supreme Court held:

      > "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for conspiracy is a distinct evil, dangerous to the public and so punishable in itself." Id at 65.

   b. Congress intended that a conspiracy claim could be asserted independent of the substantive claims. Otherwise it would have relied upon the general conspiracy statute, 18 U.S.C. §371 to punish persons who conspire to violate §§1962(b) or (c). The creation of a separate RICO conspiracy statute together with the language of §1964(c) means that a conspiracy claim may be asserted with or without a violation of the substantive crimes in subsections (a), (b) or (c). §1964(c) treats equally without distinction the separate subsections of §1962(a), (b), (c) or (d) in authorizing civil

suit by persons injured by reason of the racketeering activity This Court's opinion has rewritten the statute and rendered superfluous the specific language used by Congress in creating four separate causes of action in 18 USC §1962.

EXERCISE OF SUPPLEMENTAL JURISDICTION OVER STATE COMMON LAW CLAIMS

The court specifically declined to exercise supplemental jurisdiction over plaintiffs' state law claims, relying on 28 USC § 1367(c)(3). Opinion, p. 8. While plaintiffs appreciate the court's dismissal of those claims was without prejudice, the reality is plaintiffs will be hard-pressed to successfully prosecute those claims anywhere except this court.

As represented to the court previously, plaintiffs dismissed their predecessor state lawsuit in Columbia County Circuit court in light of Judge Ashmanskas' remand in USDC Case No. CV01-00212 AS and were prepared to litigate all their state and federal claims fully in the instant action. It is likely those claims cannot be filed or revived in state court due to potential claim preclusion and/or statute of limitations defenses. The running of the statute of limitations on a pendent state law claim is a salient factor to be evaluated in deciding whether the federal court should retain jurisdiction of such claims. O'Connor v. Commonwealth Gas Co., 251 F.3d 262 (1st Cir, 2001). Clearly the same rationale obtains with respect to possible claim preclusion.

With particular reference to RICO claims, supplemental jurisdiction was found to exist over state law claims, even though individual plaintiffs lacked standing to bring RICO claims, and no diversity existed, because all the claims arose from the same nucleus of operative facts. Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963 (EDNY, 1995).

Respectfully, the court should retain jurisdiction over Plaintiffs' state common law claims, irrespective of the disposition of the federal statutory claims.

CONCLUSION:

The Court's judgment should be vacated and its Opinion rescinded. The motions to dismiss should be denied. It cannot be

said that there are no set of facts under which the RICO claims cannot be proven, once the Court reconsiders and amends its erroneous interpretation of the RICO statute. For the same reasons the ORICO claims should be reinstated and the Court should accept ancillary jurisdiction over the Oregon state law claims.

DATED this 14th day of January, 2002.

Herbert G. Grey, OSB # 81025
David B. Adler, WSBA # 16585
Of Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC; an Oregon Corp.;	U. S. D.C. Or.
Plaintiff	No: CV'01-447 KI
and	Ninth Circuit
REGGIE D. HUFF; LISA G. HUFF	No. 02-35176
Plaintiffs – Appellants	
v.	**RICO**
THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, INC., an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, Jr.; ROBERT K. JACKSON; LUANN JACKSON; RODERICK A. BOUTIN	
Defendants – Appellees	

Informal
APPELLANTS' BRIEF

Appeal from judgment of dismissal with prejudice in part and without prejudice in part and orders denying reconsideration for relief from judgment of the U.S. District Court for the District of Oregon.

The Honorable Garr M. King, U.S.D.C. Judge

Reggie D. Huff and
Lisa G. Huff
34685 Bachelor Flat Road
St. Helens, Oregon 97051
(503)366-0223 or (800)936-9394

Plaintiff – Appellants Pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

December 5, 2002

CA No. 02-35176 Acro-tech Inc. v. The Robert K.

Recently you received notice that the United States Court of Appeals was considering submitting your case without oral argument. That notice reflected the tentative assignment of your case to a panel of the Court assigned to decide cases without oral argument.

Upon further consideration, the Court has decided that your case should be reassigned to an oral argument panel. Although in most instances a reassigned case will receive oral argument, the panel of judges to whom the case will be assigned has discretion to order the case submitted on the briefs without oral argument. When the time and place for argument before or submission to an argument panel has been determined by the Court, our office will notify you by mail.

Very truly yours,

Cathy A. Catterson
Court Clerk

By: Tim Hom
Deputy Clerk

From the desk of:
Reggie D. Huff
5PO Box 4651
Warren, OH 44483
(330)372-6615

Cathy A Catterson and/or Tim Hom
Clerk of Court / Deputy Clerk
U. S. Court of Appeals for the Ninth Circuit
95 Seventh Street
PO Box 193939
San Francisco, CA 94119-3939

RE: CA No. #02-35176 Acro-tech Inc. v. The Robert K.

June 24, 2003

Dear Ms. Catterson and/or Mr. Hom:

I am in receipt of your letter dated December 5, 2002 regarding submission of the above case to the court for oral arguments.

Thank you for your astute administration of this matter. I agree that a case of this rare, classic RICO nature should be given every opportunity to be fully heard and analyzed. Upon further reflection I should have requested oral arguments. Please forgive my trepidation.

While the thought of making oral arguments before the Ninth Circuit would understandably make me a little nervous, please inform the court that I intend to embrace the responsibility. I intend to be prepared and able to answer most questions one would anticipate in this case.

Also, I should not have a problem scheduling a trip to San Francisco at any time between now and at least the end of the year.

Thank you again for your astute administration.

Very truly yours,
Reggie D. Huff – Appellant

cc: S. Michael Rose; Michael T. Stone; Roderick Boutin/Defendant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCATION OF HEARING FOR SEPTEMBER CALENDAR:
United States District Court
Mark O. Hatfield United States Courthouse
1000 Southwest Third Avenue
Portland, OR 97204-2902

Date of Notice
July 22, 2003

☞☞Picture ID required to enter Courthouse
All CJA Counsel call (415) 556-9853 for travel authorization

Thursday, September 11, 2003 9:30 a.m. Courtroom 16

( ) *	02-35460	Gibertson v. Albright
( ) *	02-35470	Graham v. Barnhart
( ) *	02-35481	Hodge v. Barnhart
( ) *	02-35541	Cochrane v. Barnhart
( ) *	02-35203	Conaway v. Baker County
( ) *	02-35268	Rotec v. Mitsubishi Corp.

Friday, September 12, 2003 9:30 a.m. Courtroom 16

(✓) *	02-35176	Acro-Tech, Inc. v. Jackson Family Trust
( ) *	02-35240	James W. Fowler v. Norchem, Inc.
( ) *	02-35252	Brooks v. Barnhart
( ) *	02-35264	Thrush v. Barnhart
( ) *	02-35278	Oatman v. Barnhart
( ) *	02-35374	Desyllas v. Bernstine
( ) *	02-35398	Arboireau v. adidas-Salomon
( ) *	02-35471	Batson v. Barnhart

*Maximum argument time 10 minutes per side
+Maximum argument time 15 minutes per side
Other Cases 20 minutes per side

Please return the enclosed Acknowledgment
of Hearing Notice to the Clerk's Office

www.ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp.,

Plaintiff,

and,

REGGIE D. HUFF and LISA G. HUFF,

Plaintiffs – Appellants,

v.

THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN,

Defendants – Appellees.

No. 02-35176

D.C. No. CV-01-447-KI

ORDER

FILED
AUG 26 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

This case shall be submitted on the briefs and record, without oral argument, on September 12, 2003, in Portland, Oregon, pursuant to Fed. R.App. P. 34(a)(2).

FOR THE COURT

CATHY A CATTERSON
CLERK OF COURT

By: _____
Howard Hom
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp., Plaintiff, and, REGGIE D. HUFF and LISA G. HUFF, Plaintiffs – Appellants, v. THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN, Defendants – Appellees.	No. 02-35176 D.C. No. CV-01-447-KI **ORDER**

FILED
AUG 28 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appellants' Motion for Reconsideration of Order for Case Submission Without Oral Arguments is DENIED.

Pursuant to Federal Rule of Appellate Procedure 28(j), a citation of supplemental authority may be provided by letter at any time before the court renders its decision.

FOR THE COURT

CATHY A CATTERSON
CLERK OF COURT

By: _____
Howard Hom
Deputy Clerk

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp.,

Plaintiff,

and,

REGGIE D. HUFF and LISA G. HUFF,

Plaintiffs – Appellants,

v.

THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN,

Defendants – Appellees.

No. 02-35176

D.C. No. CV-01-447-KI

MEMORANDUM

FILED
SEP 30 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Submitted September 12, 2003**
Portland, Oregon

Before: ALDISERT,*** GRABER, and GOULD, Circuit Judges.

Plaintiffs Reggie and Lisa Huff appeal the district court's dismissal of their state and federal RICO actions against Defendants.

1. The district court did not err in dismissing Plaintiffs' 18 U.S.C. § 1962(c) RICO and Oregon Revised Statute ("ORS") § 166.720(3) ORICO claims. Reviewing de novo, we agree with the district court's holding that Plaintiffs' Second Amended Complaint did not adequately plead "enterprise."

Plaintiffs alleged that Hallsworth and Robert Jackson made decisions together and worked cooperatively. This allegation is one of conspiracy – it does not satisfy the standard that an enterprise must, "[a]t minimum, ... have some sort of structure ... for the making of decision s and some mechanisms for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (internal quotation marks omitted).

Plaintiffs' allegation that Boutin exercised control over the enterprise is also inadequate. Boutin was not a member of the alleged enterprise. Further, it is unclear how Boutin could have "exercised control" over the enterprise via "consultation and advice" to Jackson and Hallsworth, who themselves were alleged to have "exercised control."

Including two corporations in the enterprise does not per se satisfy the requirement that the enterprise be a separate entity apart from the pattern of racketeering activity in which it engages. Chang v. Chen, 80 F.3d 1293, 1300 (9th Cir. 1996): see also Simon, 208 F.3d at 1083-84. In this case, Plaintiffs failed to allege

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** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

either that a system of authority existed in a separate enterprise or that Defendants utilized a structure apart from the predicate acts to distribute the proceeds of the racketeering activity.

Oregon's RICO is modeled after the federal statute. Federal cases interpreting the federal statute are persuasive in interpreting the parallel Oregon provision. State v. Blossom, 744 P.2d 281, 283 (Or. Ct. App. 1987). ORS § 166.720(3) parallels § 1962(c). Because the district court correctly dismissed Plaintiffs' § 1962(c) claim, the court also correctly dismissed Plaintiffs' ORS § 166.720)3) claim.

2. The district court did not err in dismissing Plaintiffs' 18 U.S.C. § 1962(b) RICO and ORS § 166.720(2) ORICO claims. The district court erred in its application of the "control" standard. See Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990). Nevertheless, Plaintiffs failed to adequately allege that Defendants gained control of Acro-Tech through racketeering activity. We therefore affirm the dismissal on this ground supported by the record. See Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750 (9th Cir. 2001).

Plaintiffs allege that Defendants gained control of Acro-Tech through three courses of conduct. First, Plaintiffs allege that Defendants exercised control over Acro-Tech as the owner of $50,000 in stock. However, as the district court noted, the stock purchase was legal, and therefore did not involve the acquiring of control through racketeering activity.

Second, Plaintiffs allege that Defendants sought to gain control of Acro-Tech as lessors on the lease for Acro-Tech's office space. Third, Plaintiffs allege that Defendants sought to gain control of Acro-Tech by hiring Hallsworth as accountant and bookkeeper. Defendants allege that the business lease and accounting services were induced by fraud and, thus, represent an attempt to gain control through racketeering activity. Plaintiffs' allegations of fraud, however, are general and do not provide the necessary particularity. See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 322 (6th Cir. 1999). Therefore, Plaintiffs failed to adequately allege that Defendants gained control of Acro-Tech through racketeering

activity. For the same reasons, Plaintiffs failed to adequately plead an ORS § 166.720(2) claim, which tracks § 1962(b).

3. The district court did not abuse its discretion when it denied Plaintiffs' leave to amend their § 1962(c) claim. In this case, two factors support the court's denial of leave to amend: futility of amendment and the fact that Plaintiffs previously amended the complaint. See Allen v. City of Beverly Hills, 911 F 2.d 367, 373 (9th Cir. 1990). The district court noted that Plaintiffs' Second Amended Complaint (Corrected) was in fact the fourth complaint Plaintiffs filed in this action. Plaintiffs were represented by counsel when they filed their Second Amended Complaint, and that filing followed the district court's September 2001 order, which had explained in detail what needed to be pleaded.

4. The district court did not abuse its discretion in declining jurisdiction over Plaintiffs' remaining non-RICO state-law claims. 28 U.S.C. § 1367(c)(3).

5. The district court did not abuse its discretion in its award of costs and fees to Defendants. Defendants were the prevailing party, and the district court therefore had the discretion to award fees under Federal Rule of Civil Procedure 54(d) and ORS § 166.725(14).

The district court awarded Defendants Hallsworth and JDH Services fees in the amount of $20,000; Defendant Boutin $15,000; and Defendants Luann and Robert K. Jackson, LB Land, and the Family Trust $20,000. In the light of the number of motions, orders and amended complaints filed in this action, a total award of fees of $55,000 was reasonable.

AFFIRMED.

Reggie D. Huff - Appellant
Lisa G. Huff - Appellant
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals Docket Number: 02-35176
Lower Court Docket Number: CV-01-447 KI

ACRO-TECH, INC; an Oregon Corp., Plaintiff, and REGGIE D. HUFF; LISA G. HUFF, Plaintiffs – Appellants, vs. THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; RODERICK A. BOUTIN, Defendants – Appellees.	**PETITION TO APPOINT INDEPENDENT COMMITTEE TO INVESTIGATE CHARGES OF ILLEGAL DISCRIMINATION UPON CLASS OF PEOPLE BY THE 9TH CIRCUIT, AND PETITION TO SUSPEND JUDGES GRABER, GOULD, AND ALDISERT PENDING DISPOSITION OF CHARGES AND/OR PETITION FOR REHEARING** **(EN BANC REQUESTED)**

Appellants Reggie D. Huff and Lisa G. Huff and in lieu of ACRO-TECH, Inc. an Oregon Corporation unable to appear respectfully assert facts charging that 9th Circuit judges **Graber, Gould**, and **Aldersert** did in fact engage in discrimination upon individuals as of class based solely on their ability to afford counsel, irregardless of subject matter relevancy to cause for insolvency.

Said conduct has in fact deliberately abridged appellants "right" to an appeal in direct contravention of the **14th Amendment of the United States Constitution**, by depriving appellants of liberty and property without "due process of law", and of "equal protection" therein. Said conduct results in an indirect violation of the **7th Amendment of the United States Constitution** as well.

STATEMENT OF RICO & CIVIL RICO

Congress designed RICO to be a powerful weapon against organized crime that fronts as legitimate enterprise while targeting legitimate enterprises for theft, control of assets, and/or violent destruction for non-capitulation.

In ***Sedima*** (***Sedima v. Imrex*** **473 U.S. 479**) the U. S. Supreme Court defined Congress's intent for civil RICO. Congress recognized that organized criminals often avoid criminal prosecution for a myriad of reasons that have nothing to do with innocence. Congress saw the value in victims being able to protect themselves and simultaneously deter crime through a powerful "quasi criminal" proceeding.

Civil RICO was not designed to be a weapon against minor business fraud, common securities fraud, and political protestors, etc. However, these types of cases have enjoyed some success in the courts including the 9th Circuit. In fact, this bastardization has resulted in the targeted RICO cases, involving extortion, blackmail, bribes, combined with fraud, obstruction of justice, and threats of physical harm becoming the extreme exception. This is especially true on the West Coast. (See 10 Am Jur Proof of Facts 3d-299)

STATEMENT OF THE SERIOUS NATURE OF THE CASE AT BAR

In light of the statement above:

1. U. S. District Court Judge **GARR M. KING** was forced to recuse himself from this case due to the discovery of personal and professional interests tied to the defendants. The racketeers paid a law firm a large sum of money to engage in serious misconduct on their behalf. Judge King had practiced law with a defendant and his partner for the same client, sometimes on the same cases, in the recent past. Further, it was discovered that Judge King's most valuable client was misappropriating funds to pay for the said RICO defendants' defense. This course of conduct put Judge King's personal friends and colleagues at serious risk of discipline, lost income, lost employment, and lawsuits from other law firms or worse, mainly if the funds were lost due to this case being successful.

These discoveries and the recusal came after Judge King's dismissal of this case. Judge King's dismissal of this case was so prejudicial and illegal that it prompted the investigation that led to these discoveries.

After Judge King was caught His clerk called appellants' counsel, Herb Grey, to inform him that Judge King had ordered the marshals office to begin an investigation of appellant Reggie D. Huff. This freaked out appellants' counsel and caused serious damage to the appellants. Later it was discovered that the claimed order of investigation was false, apparently designed to frighten appellants away from pursuing the issue of Judge King's disqualification. Judge King is responsible for his clerks and may have directed this serious extra judicial misconduct. This matter should be investigated openly before the public. Judge King and his staff should all be questioned under oath in a manner consistent with a desire to verify the truth.

Appellants had desired not to raise this issue on appeal. However, defendants had already lied about this and spun it to claim that appellants had engaged in misconduct and Judge King was merely an innocent victim. Since this is a lie,

nonetheless, very favorable to some judges who may rule on our case, not defending oneself is not an option. You can directly thank the defendants for this coming out.

2. This case includes classic criminal RICO elements such as:
   a. **Extortion**
   b. **Blackmail**
   c. **Coercion**
   d. **Travel act violations**
   e. **Obstruction of justice**
   f. **Threats of physical harm**
   g. **Etc.**
3. This case includes classic criminal RICO evidence not limited to and including:
   a. **Secret audio-tapes, already deemed by court as legal, in which the main defendant explains in explicit terms ultimatum threats. In one tape Jackson discusses a previous victim circumstance in which gun play occurred and the victim was forced to flee under threat of death.**
   b. **Damning documents in perp's own handwriting.**
   c. **Sworn testimony of many highly credible and unimpeachable witnesses.**
   d. **Fraudulent public documents of the smoking gun variety.**
   e. **Perjury wherein perp's absolute material sworn statements are directly impeached by perp's own explicit tape-recorded statements.**
4. Many facts and evidence have been tested before an actual jury. The jury concluded that the defendants' conduct was so egregious and relentless that it reduced the value of the victims' commercial lease to zero (0). That judgment stands.
5. This RICO case was originally pled under the signature of a former federal prosecutor and RICO specialist with perhaps more experience in RICO on both sides than any other attorney in the northwest, (at least 6 cases).
6. Other victims, elderly, that have no affiliation to plaintiffs in this case have come forward and have lodged similar

complaints to the local DA, Steven Atchison. (Phone # 503-397-0300)

7. The victim enterprise engaged in very promising environmental research that was funded in part by the EPA.
8. At this point all courts involved are required by law to accept all facts alleged including 30+ crimes in the complaint as true.
9. The true number of victims that have suffered quantifiable as well as non-quantifiable damage as a result of the noted "true" crimes is approximately 150.

THE CHARGE

Despite the factual character of the case, available upon the reviewable record, the assigned appellate panel treated this case as frivolous, and violated the 14th Amendment right to due process and equal protection under the law. This treatment was purely based on the fact that the case is currently represented by pro se appellants, rather than a famous attorney or law firm. After expending much capital for a RICO specialist, the pro se representation itself is prima fascia evidence of the "control" effect of the ongoing crime that is true, and remaining unanswered by the defendants, must by law be accepted as true in this court.

The fact that the victim enterprise can no longer afford counsel and had to drop out of the appeal, and that individual victims were forced into pro se service in light of the crimes, should have led to this case being treated much more seriously than the run of the mill civil case. Instead the exact opposite occurred.

The crux of the charge here today is not merely that appellants received an improper appeal, although elements are clearly improper, but that fundamentally appellants received no appeal at all.

While to many it may make perfect sense to assume that judges from this court may abuse their power to protect a fellow District Court judge from his own improper conduct, which resulted in his belated recusal, appellants here are NOT making that charge. Appellants currently have no evidence to support this

charge. However, appellants respectfully point out that to the public the treatment of this case does not look good.

FACTS & EVIDENCE SUPPORTING THE CHARGE

Appellants conducted a study of 9th Circuit cases using **West Law ®** to determine if, in fact, there is a large statistical difference in the outcome of cases in which appellants were pro se v. those that could afford counsel. A large enough difference simply cannot be reconciled with arguments of frivolity, etc.

The parameters of study are as follows:

1. Sample only from the most recent cases backward.
2. Sample approximately 200 civil cases for each category.
3. The pro se sample obviously must exclude cases where attorneys are acting pro se and it is obvious to the court, or where pro se appellant is one of several, where others are represented by counsel.
4. This court has been accused, rightly or wrongly, of being a pro-criminal court. As obvious law-abiding victims of crime, appellants here are interested in the treatment of law-abiding pro se appellants. Therefore convicted criminals and illegal aliens are excluded.

The pro se sample reveals only two (2) cases resulting in reversal in favor of pro se appellants. They are: ***Newdow v. U. S. Congress*** 292 F.3d. 597 and ***Hall v. Norton*** 266 F.3d 969. This is approximately 1%. However it must be noted that both of these cases involve controversial issues of public policy in the areas this court has been previously noted for having favored for advancement of certain political causes and not necessarily the law. [1] Noting this distinction it would appear that victims of crime

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1 Appellants are in fact environmentalists. Appellant Reggie D. Huff takes great pride in and has been recognized for his work in reducing auto emissions through increased efficiency. Mr. Huff is a holder of four (4) patents. He has won a competitive research contract with the EPA. His work has been published by the **EPA**, ***Popular Science***, ***Motor Trend Magazine***, and a host of lessor known publications. Dr. Edgar Berkey, of Center for hazardous Material Research, or CHMR, has formally

who are unable to present an issue of the "politically correct" variety have ZERO (0) percent chance of having the errors against them reversed.

The comparison sample reveals that, at a minimum, the District Courts commit error on approximately 50% of their cases that are brought before the Appeals Court. Therefore, an argument that pro se appellants receive fair and actual review on the law is also an argument that the lower courts' error rate magically drops to at or near zero (0) only where pro se appellants are involved.

Some judges like to claim that judges in general go out of their way to be fair to pro se litigants. Reality tells a different story, especially in cases wherein the opposing side has counsel and no chance to win on the law. The goal is to kill competition against attorneys. [2] Therefore, pro se litigants find their intelligence being insulted. The law, binding precedent, court rules, and plain common sense are routinely suspended or violated in a manner consistent with assisting the attorneys on the other side. These errors are simply hidden within the perceived complexities of the law and the perception that the appellant system is an effective check.

In addition, appellants' short study shows that there is virtually no accountability through the appellate system. The lack of accountability would always tend to make the error rate increase and never would allow it to reduce 50 times to 1% or less. Even if one could prove that lower court judges are three (3) times more accurate when dealing with pro se litigants the sample should reveal approximately 33 cases of reversal, not just two (2) 'politically correct' ones.

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recognized and praised Mr. Huff's work.

2 The legal profession is akin to a major industry in which many have become very affluent and powerful by promoting the perception that one has no chance of success unless one hires one of its sanctioned practitioners. Judges are a product of that industry and have the power to squash competition and hide the fact, all while rationalizing there is some greater good in it. Surely not all do this.

No industry in the world, if given the opportunity to put a legal stamp upon an illegal squashing of its competition, would not do so. To ask judges to exercise restraint in dealing with pro se litigants is asking them to go against human nature. Nonetheless, the Constitution demands it.

It is clear that many judges are simply biased against pro se appellants for being pro se. This puts the pro se appellants on an unequal footing before a single argument is read, if the arguments are even read at all.

In ***Douglas v. California*** 372 U.S. 3531 83 S. Ct. 814 (1963) Justice Clark, dissenting, argued against 14th Amendment protection for pro se appellants saying:

"We all know that the overwhelming percentage of in forma pauperis appeals are frivolous."

He then cited some statistics in a footnote to support his arguments. First, he assumes that all pro se appeals are given the exact same respect, time, energy, and fair objective analysis in determining their merits. Then he simultaneously contends that they are virtually all a waste of the court's time. The statistics back this up in his mind, which teaches to disrespect pro se appeals as a waste of time, which leads to high failure rates, which are then used to prove they are frivolous and a waste of time, and so on. This becomes a circular argument and a self-fulfilling prophecy. Justice Clark used this bias to describe the appointment of counsel to indigent appellants as a "**useless gesture**" and an "**utter extravagance and a waste of the state's funds**."

Apparently, in Justice Clark's world, the mere fact one finds oneself poor, without respect to cause or intelligence, is proof enough of the 'utter uselessness' of one's case before a single fact or argument is even read.

HUFF V. JACKSON

Once in a lifetime a case develops into the perfect test case to prove judicial bias against pro se appellants. Such a case may serve well for many years as the poster child of the evils of pro se discrimination.

The extremely fortuitous elements in this case that form the ultimate test case are not limited to and include the following:

1. Serious non-frivolous nature that is not debatable. (See "Statement of Serious Nature of This Case.")
2. The reason the pro se appellants are pro se is honorable and acts as prima fascia evidence in support of the merits of the case itself.
3. Pro se appellants are otherwise credible contributors to society, and victims of relentless crime.
4. The case is at a stage where the charges of crime are not debatable, but are all "true".
5. The case does not directly involve certain types of politically correct subject matter that may skew the test.
6. The case is 100% reversible upon fair and actual review on the law, both current and common.
7. Briefs are written with direct assistance of an attorney with a record of winning appeals in the 9th Circuit. This eliminates the false argument that pro se appellants are incapable of presenting cognizable legal arguments.
8. The case contains the highly unusual effective stipulation of reversible error on the record by the lower court itself. This eliminates debate as to whether there is error plain enough that any fair and actual review simply could and would not miss it.
9. A former federal prosecutor found the court's errors so plentiful and egregious that he called them "extreme prejudice" and demanded the courts entire opinion be "rescinded".

A test case is very important for verification of the statistical evidence and to support the charge of illegal discrimination.

The statistical evidence, and the actual experience of pro se litigants as a class, as well as the inherent bias among many judges, such as Justice Clark, would predict that this test case would be treated merely as an opportunity to rubber stamp the District Court's illegal rulings and administration. No actual absolute statutory right of appeal would be respected. Whole questions on appeal under this court's non-discretionary

jurisdiction will be completely ignored, and not ruled on, in direct violation of appellants' right to an appeal. Any memorandum produced will not contain one shred of evidence that a single word of the appellants' arguments, precedent, facts, authorities, etc., were even read, let alone considered.

Others would predict the exact opposite, claiming that all appeals receive the same thorough, exacting, fair, complete and actual review. And any actual reversible error would be reversed, regardless of the ability of the appellants to afford counsel.

ANALYSIS OF FACTUAL TREATMENT OF TEST CASE

The Notice of Appeal in this case states clearly what is being appealed:

1. **"Final Order denying the Second Amended Motion for Reconsideration"**
2. **"Final Order denying Motion for Relief from Judgment"**

The actual orders were included with the Notice of Appeal.

The First Amended Notice of Appeal states:

1. **"Final Order denying the Motions (2) for Reconsideration"**
2. **"Final Order denying Motion for Relief from Judgement"**

And the actual orders were included with the Notice.

The Appellants' Brief included on its title page the following:

"Appeal from ... orders denying reconsideration for relief from judgment of the U. S. District Court for the District of Oregon."

The Appellants' Brief includes in the statement of issues presented for review the following:

"(5) Did the District Court abuse discretion in denial of plaintiffs' various motions for reconsideration under FRCP 59(e) and/or 60(b) and 15(a)?"

Also, it is self-evident that appellants paid their court fees and met all statutory requirements for asserting "appeal as of right."

After some eighteen (18) months appellants have received no review or ruling on these final orders. They were simply ignored. This is key to the charge.

Further, appellants raised the issue in their Brief:

"(4) Did the District Court abuse discretion under FRCP 15(a)?"

Yet the panel only ruled that the court did not abuse discretion in disallowing repleading in one claim, **18 USC §1962(c)**, and did not rule on five (5) other RICO claims.

Further, appellants raised the issue:

"(3) Did the District Court err in making improper conclusions of fact at the non-discovery pleading stage under FRCP 12(b)(6) motions regarding the legality of defendants' control of or interest in the victim enterprise under 18 USC §1962(b)....?"

This question was also ignored as presented, which is key.

Further, appellants raised the issue:

"(2) Did the District Court err in its application of pleading requirements exceeding FRCP 8(a) at the court ordered instantly fatal mid-trial point, creating prejudice to plaintiffs?"

This question is entirely valid in light of the court's actual administration and was completely ignored.

Therefore, it is clear upon the record that the appeal the appellants paid for, have an absolute statutory and constitutional right to, and have waited eighteen (18) months for simply has not occurred. This is a clear basis for rehearing en banc, or with a new panel

Further, it is clear that the questions that were addressed were completely devoid of any consideration of the appellants' arguments, facts, and precedent. No argument that the appellants received an actual appeal has any credibility where the "pro se" appellants are clearly invisible to the actual process of review.

Counsel in this case below, David Adler, was absolutely dumbfounded at the court's tactics in dismissing. The actions were consistent with desperation to dismiss an extremely strong case that threatened personal and professional interests. The appellants respectfully, but definitively detailed much of this in the record on appeal, not limited to and including:

1. The court stated in its first opinion that the presence of the two defendant corporations interchangeably owned by three other

defendants was sufficient to meet the separate entity test under ***Chang v. Chen*** 80 F.3d 1293 (9th Cir. 1996). The court ordered plaintiffs to focus re-pleading only on areas that were deemed deficient, and required that the document be kept as short as possible.

In its Second Opinion the court said: "I've changed my mind," using ***Simon v. Behavior Health Sciences*** 208 F.3d 1073 (9th Cir.) as the basis, and summarily dismissed claim **18 USC 1962(c)** with prejudice, creating a pleading trap.

2. In its First Opinion the court said it required a statement of how internal decision-making was done in the criminal enterprise as if appellants had a crystal ball. This is clearly outside **FRCP 8(a)** pleading rules. Thus the question presented for review and ignored by the panel. Nonetheless, appellants complied.

   In the Second Opinion the court concluded that this statement was not acceptable, because it was not based on identical conduct. The court provided no basis for this again, and further added anew that the manner of distribution of proceeds was necessary. Appellants still cannot conceive how any gang of organized crooks could all engage in identical conduct and even operate. This seems asinine. (See **ER 205-215**, authored by David Adler, Esq.) This also created a pleading trap.

3. In the District Court's First Opinion the court concluded that a "pattern" was not adequately pled. In its Second Opinion the court had no concerns about the pattern, but shifted to the issue of "control". The court created a brand new pleading standard that ignores the strength of the "pattern" entirely and any "control" that emanates from that pattern and restricts the control to mean only 'direct' financial "control". The court ignored the direct statutory language of **18 USC §1962(b)** and binding authority of the 9th Circuit. (See **ER 205-215**, Motion for Reconsideration, authored by David B. Adler, Esq.) In addition, the District Court plainly ignored a square allegation in the pleading stating the financial interest was illegal, and summarily declared it as legal, making an illegal conclusion of

controverted fact. This was the sole basis for the dismissal of the **18 USC §1962(b)** claim.

4. The District court's Second Opinion included a footnote as follows:

"Plaintiffs discovered some small errors in the Second Amended complaint and filed a corrected version."

Judge King was well informed that the corrections were highly technical in nature, namely accidentally placing names of defendants under the heading of the wrong claim.

At the end of his opinion Judge King stated:

"Although the complaint is entitled the Second Amended Complaint (corrected) it is the fourth complaint plaintiffs filed in this action."

Judge King could provide no basis, under ***Foman*** or otherwise, for not allowing re-pleading, other than to misrepresent the number of actual pleading opportunities, in clear contradiction of his own footnote in the same document. (See ***Eminence Capital, LLC v. Aspeon, Inc.*** 316 F.3d 1048. Counting pleadings, especially in complex cases, is not a basis for denying re-pleading any more in the 9th Circuit.)

The dismissal of this case is fraught with errors, including illegal pleading requirements, contradictions, improper conclusions of law, pleading traps, misrepresentation, violations of court rules, etc., all in a manner that benefited only the defendants.

Appellants' RICO specialist counsel found the dismissal so bad he called it "**extreme prejudice**" and stated that the court's opinion should be "**rescinded**". At this time appellants would like to include that document in this petition as if set out in full. It can be found at **ER 205-215**.

Only months ago this court took a more solid position under ***Foman***, 37 U.S. 182, than the appellants have found anywhere else in the U.S. The case is ***Eminence Capital, LLC v. Aspeon, Inc.*** (Jan. 2003) 316 F.3d 1048.

It is clear now that it is not proper to merely count pleading attempts when determining right to re-plead, especially in complex cases. This being so, a deliberate attempt to inflate the actual number of real pleading opportunities should be disfavored

in the extreme. Appellants augmented their already well supported arguments with this new case authority well before final decision. (See the record.) The appellate panel completely ignored it and merely repeated the District Court's false count of pleading opportunities in direct contravention with known binding precedent. The only explanation is that appellants are treated as invisible because they cannot presently afford an attorney.

The violation of the **14th Amendment** is very plain and simple to illustrate in this case. This is how it works:

➢ Case A (***Eminence Capital, LLC v. Aspeon, Inc.*** for example):

1. **Appellants *can* afford counsel.**
2. Complex case
3. Dismissal with prejudice; No **Foman** factors invoked; Complete reliance on count of pleading opportunities in determining futility in re-pleading.
   = **Appellant's arguments fully considered**
   = **Reversal & Remand & Rebuke from 9th Circuit**

➢ Case B (**Huff v. The Jackson Family**):

1. **Appellants *cannot* afford counsel for good reason.**
2. Complex case
3. Dismissal with prejudice; No ***Foman*** factors invoked; complete reliance on (disingenuous) count of pleading opportunities in determining futility in re-pleading.
   = Appellant's arguments (same as above, same authorities, etc.) completely ignored.
   = Affirmed from 9th Circuit (No reason for the difference given.)

This is an egregious example of **unequal protection** under the law. This is an additional clear basis for rehearing.

Further, the appellate panel's utter refusal to even acknowledge the obligation to review and rule on the Orders denying Motion for Reconsideration and Relief from Judgment is extremely fortuitous for the defendants and the District Court. These motions prove the plaintiffs can re-plead to any standard the court wants, whether legal or not.

The court claims that because there are two defendant corporations and not just one then it needs a more cognizable structure to the enterprise and information on how proceeds are distributed.

In the various motions for reconsideration and relief on the record plaintiffs stated they are in possession of sworn testimony of John Hallsworth, Jr. wherein he reluctantly admitted that JDH Services, (the second corporation), has only one client, that being L. B. Land, (the first corporation).This means that JDH Services is merely a subsidiary of L. B. Land. This turns two corporations into one. This also makes Robert Jackson the king pin of the whole operation, as owner of L.B. Land and part owner of JDH Services.

Further, plaintiffs established on the record that they possess cancelled checks where money from a fraudulent lease flowed through JDH Services to L. B. Land. Plaintiffs also have documents showing money going from L. B. Land to the law firm of Bowerman & Boutin, wherewith Roderick A. Boutin received payment.

Stunning, is it not? Most pleaders would not have this information without discovery, which we were denied twice, but we do. This produces overwhelming doubt that re-pleading would be futile.

Also, plaintiffs showed how the District Court's conclusion that the Second Amended Complaint (corrected) did not claim that a financial interest was acquired through racketeering was just flat wrong. Once again the appellate panel merely parroted the District Court's illegal conclusion of facts, making appellants invisible just because they cannot afford an attorney.

One of the factors that make this case unique is the lower court's self-contradiction, which creates a stipulation of reversible error on the record by the court itself. Debate on court errors is removed where it is simply not possible for the court to be correct in both opinions that contradict each other. Whether the court's first or second opinion is in error is irrelevant where plaintiffs are damaged in either case. The court's judgment must be reversed and the case remanded under these circumstances. Once again, there is

no reference from the appellate panel to these facts. They are simply ignored. They cannot be ignored while claiming an actual fair review occurred.

CONCLUSION

Owing to the fact that many attorneys are paid well to file appeals with little chance for success, at the direction of their clients, the reversal rate indicates that a strong majority of cases filed in this court receive a thorough, fair, and objective review. There is no evidence of bias in favor of the lower courts. This is commendable, especially in light of this court's current workload. However these positive facts only make appellants charge of discrimination much more credible and powerful.

It is a clear violation of the **14th Amendment** to assume that appellants who either choose or are forced to exercise their right to self-representation have automatically waived their right to effective representation and therefore have no interest in a fair and legal outcome. Pro se appellants have an absolute Constitutional right to receive exactly the same chance of reversal on questions of clear error as those that can afford an attorney. Clearly this case proves this is not occurring in this court, and it clearly did not happen in this case.

That's not due process!

That's not equal protection!

How could it be, when this court now stands ready to force the appellants to give $55,000 to criminals who have already taken everything, without even reading their Briefs?

The public will see this case as just another example of the 9th Circuit favoring criminals over victims. If this is a false perception then no one benefits except the defendants. It is good public policy for this or any court once in a while to demonstrate to the people who own the court that it is not being run by a bunch of heartless bastards. All the appellants are asking for is a single fair and thorough hearing of this case, which they have an absolute right to demand. [3]

---

3 It should not be assumed that appellants intend to go through an entire RICO trial without counsel.

Cases such as ***Douglas v. California*** 372 U.S. 353 and ***Evitts v. Lucey*** 469 U.S. 387 deal with the issue of due process and equal protection as it relates to an appeal.

In ***Douglas*** the court stated:

"Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. U.S.C.A. Const. Amend. 14."

These cases dealt with the issue of whether the state should pay for counsel for criminal defendants.

The question appellants raise today is a different and more serious one. Not being given a free attorney is not necessarily the end of the road, whereas being summarily denied the right to a fair and thorough and actual review probably is.

In light of the above facts, appellants respectfully request a rehearing En Banc, or, in the alternative, a re-panel hearing. Appellants contend that Judges Graber, Gould, and Aldisert are not impartial, especially in light of the charges within this petition. Appellants further request oral argument, and that this matter be given priority due to the amount of time already invested.

Respectfully submitted this 14th day of October 2003.

By: _____

Reggie D. Huff, Pro se

By: _____

Lisa G. Huff, Pro se

Reggie D. Huff
Lisa G. Huff
PO Box 4351
Warren, OH 44482
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals Docket Number: 02-35176
Lower Court Docket Number: CV-01-447 KI

ACRO-TECH, INC; an Oregon Corp.,	**AFFIDAVIT IN SUPPORT OF: PETITION TO APPOINT INDEPENDENT COMMITTEE TO INVESTIGATE CHARGES OF ILLEGAL DISCRIMINATION UPON CLASS OF PEOPLE BY THE 9TH CIRCUIT,**
Plaintiff,	
and	
REGGIE D. HUFF; LISA G. HUFF,	
Plaintiffs – Appellants,	
vs.	**AND**
THE ROBERT JACKSON FAMILY TRUST; L. B. LAND, an Oregon Corp; JDH SERVICES INC., an Oregon Corp.; JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; RODERICK A. BOUTIN,	**PETITION TO SUSPEND JUDGES GRABER, GOULD, AND ALDISERT PENDING DISPOSITION OF CHARGES**
	AND/OR
	PETITION FOR REHEARING
Defendants – Appellees.	**(EN BANC REQUESTED)**

State of Ohio }
} ss.
County of Trumbull }

I, Reggie D. Huff, being first duly sworn, do depose and say that:

1. I am an appellant in the above case.
2. I authored the **PETITION TO APPOINT INDEPENDENT COMMITTEE TO INVESTIGATE CHARGES OF ILLEGAL DISCRIMINATION UPON CLASS OF PEOPLE BY THE 9TH CIRCUIT, AND PETITION TO SUSPEND JUDGES GRABER, GOULD, AND ALDISERT PENDING DISPOSITION OF CHARGES AND/OR PETITION FOR REHEARING** with the assistance of co-appellant Lisa G. Huff. We alone are responsible for it.
3. All of the facts and assertions of facts contained within the said petition are true to the best of my knowledge, and are presented for a good and proper purpose, and not for needless delay.

The above is true as I verily believe.

_____

Reggie D. Huff

Subscribed and sworn to before me this ____ day of ____ 2003.

_____

NOTARY PUBLIC FOR OHIO

My commission expires: _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp., Plaintiff, and, REGGIE D. HUFF and LISA G. HUFF, Plaintiffs – Appellants, v. THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN, Defendants – Appellees.	No. 02-35176 D.C. No. CV-01-447-KI **ORDER**

FILED
OCT 24 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: ALDERSERT,* GRABER, and GOULD, Circuit Judges

The "Petition to Appoint Independent Committee to Investigate Charges of Illegal Discrimination Upon Class of People by the 9th Circuit, and Petition to Suspend Judges Graber, Gould, and [Aldisert] Pending Disposition of Charges and/or Petition for Rehearing (En Banc Requested)" received October 16, 2003, is ordered to be filed.

* The Honorable Ruggero J. Aldersert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp., Plaintiff, and, REGGIE D. HUFF and LISA G. HUFF, Plaintiffs – Appellants, v. THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN, Defendants – Appellees.	No. 02-35176 D.C. No. CV-01-447-KI **ORDER**

FILED
NOV 24 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: ALDERSERT,* GRABER, and GOULD, Circuit Judges

We construe the Petition filed October 16, 2003 ("Petition"), to be, in part, a petition for panel rehearing and petition for rehearing en banc.

The memorandum disposition filed September 30, 2003, is amended. With the filing of the amended memorandum disposition contemporaneously with this order, the panel has voted to deny the petition for panel rehearing. Judges Graber and Gould

* The Honorable Ruggero J. Aldersert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

have voted to deny the petition for rehearing en banc, and Judge Aldersert has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

We also construe the Petition, to be, in part, a motion to recuse the members of the panel. So construed, the motion is DENIED.

Finally, we construe the Petition to be, in part, a complaint of judicial misconduct. So construed, the complaint has been forwarded to the Clerk of the Court for such further proceedings as may be appropriate.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp., Plaintiff, and, REGGIE D. HUFF and LISA G. HUFF, Plaintiffs – Appellants, v. THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN, Defendants – Appellees.	No. 02-35176 D.C. No. CV-01-447-KI **AMENDED MEMORANDUM**

FILED
NOV 24 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Submitted September 12, 2003**
Portland, Oregon

Before: ALDISERT,*** GRABER, and GOULD, Circuit Judges.

Plaintiffs Reggie and Lisa Huff appeal the district court's denial of their motion to reconsider the dismissal of their state and federal RICO actions against Defendants. We review for abuse of discretion a district court's denial of a motion to reconsider an order granting summary judgment. Sch. Dist. No. 1J, Multnomah County, Or. V. AC&S, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Reconsideration is appropriate if the district court: (1) is presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. Id. At 1263. The first and third grounds are inapplicable in this case. We therefore consider only whether the district court committed clear error and whether its decision was manifestly unjust.

1. The district court did not err in dismissing Plaintiffs' 18 U.S.C. § 1962(c) RICO and Oregon Revised Statute ("ORS") § 166.720(3) ORICO claims. Reviewing de novo, we agree with the district court's holding that Plaintiffs' Second Amended Complaint did not adequately plead "enterprise."

Plaintiffs alleged that Hallsworth and Robert Jackson made decisions together and worked cooperatively. This allegation is one of conspiracy – it does not satisfy the standard that an enterprise must, "[a]t minimum, ... have some sort of structure ... for the making of decision s and some mechanisms for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (internal quotation marks omitted).

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Plaintiffs' allegation that Boutin exercised control over the enterprise is also inadequate. Boutin was not a member of the alleged enterprise. Further, it is unclear how Boutin could have "exercised control" over the enterprise via "consultation and advice" to Jackson and Hallsworth, who themselves were alleged to have "exercised control."

Including two corporations in the enterprise does not per se satisfy the requirement that the enterprise be a separate entity apart from the pattern of racketeering activity in which it engages. Chang v. Chen, 80 F.3d 1293, 1300 (9th Cir. 1996): see also Simon, 208 F.3d at 1083-84. In this case, Plaintiffs failed to allege either that a system of authority existed in a separate enterprise or that Defendants utilized a structure apart from the predicate acts to distribute the proceeds of the racketeering activity.

Oregon's RICO is modeled after the federal statute. Federal cases interpreting the federal statute are persuasive in interpreting the parallel Oregon provision. State v. Blossom, 744 P.2d 281, 283 (Or. Ct. App. 1987). ORS § 166.720(3) parallels § 1962(c). Because the district court correctly dismissed Plaintiffs' § 1962(c) claim, the court also correctly dismissed Plaintiffs' ORS § 166.720)3) claim.

2. The district court did not err in dismissing Plaintiffs' 18 U.S.C. § 1962(b) RICO and ORS § 166.720(2) ORICO claims. The district court erred in its application of the "control" standard. See Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990). Nevertheless, Plaintiffs failed to adequately allege that Defendants gained control of Acro-Tech through racketeering activity. We therefore affirm the dismissal on this ground supported by the record. See Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750 (9th Cir. 2001).

Plaintiffs allege that Defendants gained control of Acro-Tech through three courses of conduct. First, Plaintiffs allege that Defendants exercised control over Acro-Tech as the owner of $50,000 in stock. However, as the district court noted, the stock purchase was legal, and therefore did not involve the acquiring of control through racketeering activity.

Second, Plaintiffs allege that Defendants sought to gain control of Acro-Tech as lessors on the lease for Acro-Tech's office space. Third, Plaintiffs allege that Defendants sought to gain control of Acro-Tech by hiring Hallsworth as accountant and bookkeeper. Defendants allege that the business lease and accounting services were induced by fraud and, thus, represent an attempt to gain control through racketeering activity. Plaintiffs' allegations of fraud, however, are general and do not provide the necessary particularity. See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 322 (6th Cir. 1999). Therefore, Plaintiffs failed to adequately allege that Defendants gained control of Acro-Tech through racketeering activity. For the same reasons, Plaintiffs failed to adequately plead an ORS § 166.720(2) claim, which tracks § 1962(b).

3. The district court did not abuse its discretion when it denied Plaintiffs' leave to amend their § 1962(c) claim. In this case, two factors support the court's denial of leave to amend: futility of amendment and the fact that Plaintiffs previously amended the complaint. See Allen v. City of Beverly Hills, 911 F 2.d 367, 373 (9th Cir. 1990). The district court noted that Plaintiffs' Second Amended Complaint (Corrected) was in fact the fourth complaint Plaintiffs filed in this action. Plaintiffs were represented by counsel when they filed their Second Amended Complaint, and that filing followed the district court's September 2001 order, which had explained in detail what needed to be pleaded.

4. The district court did not abuse its discretion in declining jurisdiction over Plaintiffs' remaining non-RICO state-law claims. 28 U.S.C. § 1367(c)(3).

5. The district court did not abuse its discretion in its award of costs and fees to Defendants. Defendants were the prevailing party, and the district court therefore had the discretion to award fees under Federal Rule of Civil Procedure 54(d) and ORS § 166.725(14).

The district court awarded Defendants Hallsworth and JDH Services fees in the amount of $20,000; Defendant Boutin $15,000; and Defendants Luann and Robert K. Jackson, LB Land, and the Family Trust $20,000. In the light of the number of

motions, orders and amended complaints filed in this action, a total award of fees of $55,000 was reasonable.

6. Because the district court's orders granting summary judgment and attorneys' fees reached the correct outcome under the controlling law, the district court did not abuse its discretion when it denied Plaintiffs' motion for reconsideration.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACRO-TECH, INC., an Oregon Corp.,
Plaintiff,
and,
REGGIE D. HUFF and LISA G. HUFF,
Plaintiffs – Appellants,
v.
THE ROBERT JACKSON FAMILY TRUST; LB LAND, INC., an Oregon Corp.; JDH SERVICES INC., an Oregon Corp., JOHN D. HALLSWORTH, JR.; ROBERT K. JACKSON; LUANN JACKSON; and RODERICK BOUTIN,
Defendants – Appellees.

No. 02-35176
D.C. No. CV-01-447-KI

ORDER

FILED
JAN 08 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: ALDERSERT,* GRABER, and GOULD, Circuit Judges

Appellants' "Motion to Recall Mandate" is DENIED.

Appellants' "(1) Motion to Clarify 'Amended Memorandum' and (2) Motion to Clarify 'Judgment' and (3) Motion to Reconsider Order Denying Recusal of Panel or (4) Motion to Return Court Fee" received December 24, 2003, is construed as a motion for leave to file and is DENIED. The mandate in this case has issued.

We also construe the motions to be, in part, a complaint of judicial misconduct. So construed, the complaint has been forwarded to the Clerk of the Court for such further proceedings as may be appropriate.

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* The Honorable Ruggero J. Aldersert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.